EFiled: Nov 19 2014 01:05PM EST
Filing ID 56359692
Case Number 385,2014

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

| | |
|---|---|
| BRANCH BANKING AND TRUST COMPANY, a bank organized under the laws of the state of North Carolina; Assignee of Mortgage Electronic Registration Systems, Inc., as nominee, a corporation organized and existing under the laws of the State of Delaware,<br><br>Plaintiff Below,<br>Appellant,<br><br>v.<br><br>HATEM G. EID A/K/A HATEM EID;<br>YVETTE EID,<br><br>Defendants Below,<br>Appellees. | Case No. 385, 2014<br><br>On Appeal from the Superior Court in and for New Castle County<br>C.A. No. N11L-12-270-CEB |

# APPELLANT'S REPLY BRIEF ON APPEAL AND CROSS-APPELLEE'S ANSWERING BRIEF ON CROSS-APPEAL

Michael Montecalvo
(*pro hac vice*)
Brent F. Powell
(*pro hac vice*)
WOMBLE CARLYLE
SANDRIDGE & RICE LLP
One W. Fourth St.
Winston-Salem, NC 27101
(336) 721-3600

Robert T. Aulgur, Jr. (No. 165)
WHITTINGTON & AULGUR
651 N. Broad St., Suite 206
P.O. Box 1040
Middletown, DE 19709
(302) 378-1661

*Counsel for Branch Banking and Trust Company*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Delaware Cases**



**Other Cases**

**Statutes**



**Rules**

## NATURE OF PROCEEDING

The Eids do not dispute that Superior Court Rule 77(d) prevented the trial court from vacating the March 20 Judgment based on the Eids' purported failure to receive notice of entry of the judgment. Instead, the Eids argue that BB&T waived any Rule 77(d) objection by failing to raise the issue below. The Eids' argument is incorrect, for two reasons. First, because the trial court's order granting the Eids' Rule 60(b) motion extended the time for the Eids to file an appeal, it presents a jurisdictional issue that BB&T cannot waive. Second, BB&T properly raised and preserved the argument. Given the Eids' apparent concession that Rule 77(d) barred the relief granted by the trial court, and the indisputable fact that the Eids failed to take a timely appeal from the March 20 Judgment, the Court should dismiss the Eids' cross-appeal for lack of jurisdiction.

Assuming that the Court reaches the merits of the Eids' cross-appeal, that cross-appeal presents two questions for the Court's review:

(1) Whether BB&T, as owner and holder of the note and assignee of the mortgage, has standing to maintain this action?

(2) Whether the trial court properly granted summary judgment to BB&T where Mr. Eid admitted that he defaulted on the note and mortgage and failed to offer any evidence disputing the accuracy and validity of the loan documents?

The Eids' arguments on cross-appeal do not rely on any actual facts or evidence in the record, but instead attempt to stitch together a patchwork of disparate decisions from other jurisdictions relating to Mortgage Electronic Registration System, Inc. ("MERS"), which is not a party to this proceeding. MERS is simply a red-herring intended to distract the Court from the simple and undisputed fact that the Eids signed the loan documents and subsequently defaulted on their obligations. The trial court properly concluded that the Eids failed to raise any issue of material fact and that BB&T was entitled to summary judgment in its favor.

## SUMMARY OF ARGUMENT

5a. Denied. BB&T had standing to bring this action as the owner and holder of the Note and assignee of the Mortgage, both of which fully comply with the requirements of Delaware law.

5b. Denied. The affidavit of Rick Miller was legally sufficient and properly considered by the trial court. Moreover, the loan documents attached to the Miller Affidavit are independently admissible under Delaware law.

5c. Denied. The trial court properly granted summary judgment for BB&T based on the documents and undisputed facts presented by BB&T. The Eids failed to present any competent evidence in opposition to BB&T's Motion for Summary Judgment.

5d. Denied. The trial court correctly concluded that the Eids failed to carry their burden of identifying an issue of disputed fact and correctly rejected the legal arguments presented by the Eids.

## ARGUMENT ON REPLY

### I. BB&T'S CHALLENGE TO THE RULE 60(b) ORDER IS PROPERLY BEFORE THE COURT.

#### A. A Party Cannot Confer Jurisdiction on this Court by Agreeing to Relief Under Rule 60(b).

Because the Rule 60(b) Order effectively extended the time for the Eids to take an appeal from the Court's judgment, that order raises a jurisdictional issue that cannot be waived. A timely-filed notice of appeal is a prerequisite to appellate jurisdiction. *Dixon v. Delaware Olds, Inc.*, 396 A.2d 963, 966 (Del. 1978) ("Appellate jurisdiction rests wholly on the 'perfecting' of an appeal within the period of limitations fixed by law.") Equally basic is the principal that parties cannot create appellate jurisdiction where none exists. *Riggs v. Riggs*, 539 A.2d 163, 163 (Del. 1988) ("[T]he parties to an appeal cannot confer jurisdiction on this Court by agreement."); *Delaware Olds*, 396 A.2d at 966 ("Neither counsel nor this Court can waive a jurisdictional defect so as to confer jurisdiction which does not otherwise exist.") Accordingly, this Court is the sole arbiter of its jurisdiction.

Faced with a similar procedural posture, the Seventh Circuit Court of Appeals concluded in *Spika v. Village of Lombard*, 763 F.2d 282 (7th Cir. 1985) that it could review a grant of a Rule 60(b) motion where neither party had raised the issue. Like the Eids, the appellant in *Spika* missed the deadline to appeal from entry of a final judgment and filed a motion to vacate under Fed. R. Civ. P. 60(b)(6), which the trial court granted. The appellee in *Spika*—unlike BB&T

here—did not challenge the grant of the Rule 60(b)(6) motion in either the trial court or on appeal. 763 F.2d at 283. The court nonetheless held that "[w]e must consider the timeliness of the appeal even though it was not raised by the parties" because the time limitations "are mandatory and a condition to the exercise of our jurisdiction. *Id*. at 283-84. The court further stated that "[i]f the district court abused its discretion in extending the appeal period by vacating and reentering judgment, we are without jurisdiction." *Id*. at 284. Thus, even if BB&T had stipulated to entry of the Rule 60(b) Order (which it did not), the Court has an independent obligation to review the order. Because the Eids do not dispute that Rule 77(d) precluded the trial court from granting the Rule 60(b) Motion, the Court should reverse the order and dismiss the Eids' cross-appeal as untimely.

### B. BB&T Raised and Preserved Its Arguments Regarding Rule 77(d) and Rule 60(b).

Counsel's statements to the trial court do not qualify as judicial admissions because they were assertions of law, not fact. As the Eids' own brief notes, judicial admissions are limited to "[k]nowing and voluntary concessions *of fact* . . . ." (Answering Br. at 8) (emphasis added). Statements of law cannot constitute judicial admissions. *See DeMars v. Carlstrom*, 948 P.2d 246, 249 (Mont. 1997) ("For a judicial admission to be binding upon a party, the admission must be one of fact rather than a conclusion of law or the expression of an opinion."); *People ex rel. Dep't of Pub. Health v. Wiley*, 810 N.E.2d 614, 623 (Ill. Ct. App.

2004) ("[A] party is not bound by admissions regarding conclusions of law since it is for the trial court to determine the legal effect of the facts adduced."). Counsel's statement to the trial court that he "wouldn't disagree" with the trial court's assertion of its authority to grant the Rule 60(b) motion plainly is not a concession of fact, but rather an erroneous concession of law. Just as parties cannot agree to give this Court jurisdiction where none exists, counsel's mistaken agreement with the trial court cannot give it the power to do that which Rule 77(d) expressly prohibits.

The Eids singular focus on counsel's statement at oral argument also ignores the fact that BB&T raised and briefed its arguments before the trial court. *See* A233-36. Supreme Court Rule 8 requires only that an issue be "fairly presented" to the trial court to preserve appellate review, and this Court has repeatedly looked to briefing in the trial court to determine whether that requirement is met. *See Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 678-79 (Del. 2013) (holding that argument was not fairly presented where it was not raised in post-trial briefing); *Telxon Corp. v. Meyerson*, 802 A.2d 257, 263 (Del. 2002) (holding that issue raised in complaint and "briefed in the trial court" was "fairly presented to that court and thus properly a subject of appeal" even where "it was not addressed by the trial court in its decision"); *see also Nw. Lincoln-Mercury v. Lincoln-Mercury*

*Div. Ford Motor Co*., 511 N.E.2d 810, 812 (Ill. Ct. App. 1987) ("Even if there is no indication that the argument was made orally, the briefs and memoranda filed with the circuit court are sufficient to preserve the issue."). The Eids do not and cannot dispute that BB&T fully briefed its arguments under both Rule 77(d) and Rule 60(b). Accordingly, those arguments were fairly presented to the trial court and preserved for appellate review.

## II. THE TRIAL COURT ERRED IN GRANTING THE RULE 60(b) MOTION.

### A. The Trial Court Did Not Apply the Correct Standard of Review.

The Eids' argument that the trial court applied the correct standard to the Rule 60(b) Motion rests not on anything said or done by the trial court, but on the Eids' own statements in their original motion as to the appropriate standard of review. (Answering Br. at 11-12). The Eids attempt to bootstrap their statement of the standard of review into the Rule 60(b) Order, arguing that "[t]he Rule 60(b) Order indicates that the trial court *relied on the arguments* made in the Rule 60(b) Motion and good cause shown to arrive at its conclusion." (*Id*. at 12.) (emphasis added).[1]

The Eids' assertion is unsupported by the plain text of the Rule 60(b) Order, which states in its entirety that:

> Upon the Defendants' Motion to Vacate the Judgment and Reopen the Case Pursuant to Superior Court Rule 60(b) and for good cause shown,
>
> IT IS HEREBY ORDERED THAT:
>
> 1. The Defendants' Motion to Vacate the Judgment and Reopen the Case Pursuant to Superior Court Rule 60(b) is GRANTED.

[1] The Eids' reliance on assertions in their brief is ironic in light of their failure to acknowledge that BB&T fully briefed its opposition to the Rule 60(b) Motion.

2. The March 20, 2014 Order shall be vacated and the case shall be reopened.

(A249.) The Rule 60(b) Order gives no indication that the trial court relied upon the Eids' statement of the standard of review, and the Eids do not dispute that the trial court failed to address explicitly either the "excusable neglect" or "extraordinary relief" standard. The trial court's failure to analyze the motion under either of those standards—coupled with its reference to an undefined "interest of justice" standard at the hearing (A246)—confirms that it did not apply the correct standard of review and warrants reversal of the Rule 60(b) Order. Moreover, as set forth below, even if the Court used the appropriate standard, the record does not support the Rule 60(b) Order.

**B. <u>The Eids Failed to Demonstrate Excusable Neglect.</u>**

The Eids' argument that their "Rule 60(b) Motion set forth the basis for counsel's reasonable belief that they would receive notice of any filings or proceedings in the action" (Answering Br. at 14) is irrelevant. Under Rule 77(d), failure to receive notice of entry cannot constitute excusable neglect as a matter of law. *See Giordano v. Marta*, 723 A.2d 833, 837 (Del. 1998) ("When the Federal Rules contained similar language [to Rule 77(d)] several years ago, the clerk's failure to mail a notice of judgment to the attorney for a party did not constitute excusable neglect for filing an untimely appeal.") (citation omitted); *Spika*, 763 F.2d at 286 ("[T]he courts have uniformly held that Rule 77(d) bars Rule 60(b)

relief when, as here, the *sole* reason asserted for that relief is the failure of a litigant to receive notice of entry of an order or judgment.") (emphasis in original). Because the Eids cite no other basis for relief under Rule 60(b)(1) than their counsel's failure to receive notice of entry, they have failed to demonstrate excusable neglect and the trial court abused its discretion in granting the Rule 60(b) Motion.

### C. The Eids Failed to Demonstrate the Existence of Extraordinary Circumstances.

Although the Eids state that Rule 60(b)(6) permits a court to vacate a judgment "whenever such action is appropriate to accomplish justice," (Answering Br. at 15) they offer no explanation—and the Rule 60(b) Order contains no discussion—as to why "justice" requires vacating the judgment in this case. A law firm's failure to account for a file after departure of a lawyer from the firm is hardly an extraordinary circumstance. This Court routinely dismisses untimely appeals, and recognizes a limited exception for failure to file a timely notice of appeal only where court personnel are responsible for a party's failure to file. *See Plummer v. R.T. Vanderbilt Co., Inc.*, 49 A.3d 1163, 1166 (Del. 2012). The Eids do not suggest that exception applies here. Because the Eids fail to explain why this case qualifies as an "extraordinary circumstance" and the trial court's order contains no findings on that issue, the trial court necessarily abused its discretion in granting the Rule 60(b) Motion.

## ARGUMENT ON CROSS-APPEAL

## III. BB&T HAS STANDING TO BRING THIS ACTION.

### A. Question Presented

Whether BB&T, as owner and holder of the note and assignee of the mortgage, has standing to maintain this action?

### B. Scope of Review

The Court reviews the issue of standing *de novo*. *Broadmeadow Inv*., *LLC v*. *Delaware Health Res*. *Bd*., 56 A.3d 1057, 1059 (Del. 2012).

### C. Merits of the Argument

The Eids conceded below that they have no evidence to dispute BB&T's status as the owner and holder of the Note and assignee of the Mortgage. That concession effectively ends the inquiry; as the undisputed owner and holder of the Note and Mortgage, BB&T has standing to collect on the debt and foreclose on the property.

The Eids nonetheless argue that the assignment of the Mortgage was invalid and devote the bulk of their argument to a review of various cases from around the country involving MERS. Significantly, however, MERS is not a party to this proceeding and the Eids presented no facts or admissible evidence relating to MERS in opposition to the motion for summary judgment. In essence, the Eids ask this Court to take judicial notice of purported facts and "admissions" in those cases and conclude that MERS cannot effect a valid transfer of the Mortgage under

Delaware law. The Eids cite no facts to support this conclusion. By making this conclusion, the Eids ignore numerous decisions upholding the validity of MERS mortgage assignments.

***1. BB&T is the Owner and Holder of the Note.***

The Eids do not seriously dispute that the Note signed by Mr. Eid is a negotiable instrument under Delaware's Uniform Commercial Code. *See* 6 Del. C. § 3-104(a). Under Delaware law, a transfer of a negotiable instrument occurs when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument. *See* 6 Del. C. § 3-203. In this case, U.S. Mortgage properly negotiated the Note by specific endorsement to BB&T. *See* 6 Del. C. § 3-204. BB&T subsequently endorsed the Note in blank, making it a bearer instrument. (A117.) BB&T became the holder of the Note when it received the endorsement from U.S. Mortgage and by its possession of the Note when it was endorsed in blank by BB&T. *See* 6 Del. C. § 1-201(b)(5); 6 Del. C. § 1-201(b)(21)(A). Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument. *See* 6 Del. C. § 3-203(b). BB&T is entitled to enforce the instrument because it is the current holder. *See* 6 Del. C. § 3-301.

The Eids did not present any competent evidence to challenge BB&T's status as note-holder, and indeed admitted they had no such evidence.

(A166 at 26.) "In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings." *See* 6 Del. C. § 3-308(a). Even when the signature is denied in the pleadings, "the signature is presumed to be authentic and authorized[.]" *Id*. Pursuant to Delaware law, "[w]henever the Uniform Commercial Code creates a 'presumption' with respect to a fact, or provides that a fact is 'presumed,' the trier of fact must find the existence of the fact unless and until evidence is introduced that supports a finding of its nonexistence." *See* 6 Del. C. § 1-206.

> Comment 1 to 6 Del. C. § 3-308 states as follows:
>
> > The burden is on the party claiming under the signature, but the signature is presumed to be authentic and authorized . . . The defendant is therefore required to make some sufficient showing of the grounds for the denial before the plaintiff is required to introduce evidence.

Accordingly, Mr. Eid's failure to produce evidence that the endorsement signatures are not authentic requires a finding of the proper existence of the signature even without additional evidence by Plaintiff. This is consistent with Rule 56(e).

The Eids' argument that BB&T's "UCC argument" was not "of record" (Answering Br. at 33) makes no sense. The Eids apparently contend that BB&T's summary judgment motion had to affirmatively plead the Delaware UCC statutes as a rebuttal to their anticipated defenses. Not surprisingly, they cite no

authority for this proposition. The Eids also cannot claim prejudice, as Judge Butler expressly permitted them to submit supplemental briefing on the "UCC issue."

Finally, the Eids attempt to muddy the waters by conflating the transfer of the Note with the assignment of the Mortgage. *See* Answering Br. at 34 ("It is without dispute that Appellee's 'endorsement' theory relies upon the validity of the alleged MERS assignment, which Appellants properly contested.")

The Eids get it exactly wrong, as BB&T's status as owner and holder of the Note under the UCC does not depend on MERS' assignment of the Mortgage.[2] The Note and Mortgage are distinct legal instruments governed by separate sections of Delaware law. Indeed, the rule at common law is that assignment of the mortgage is unnecessary; the mortgage follows the note and the owner and holder of a note has the power to foreclose on the mortgage. *See RMS Residential Prop., LLC* v. *Miller*, 32 A.3d 307, 313 (Conn. 2011) (noting that Connecticut has codified the "well established common-law principle that the mortgage follows the note, pursuant to which only the rightful owner of the note

[2] Although the Mortgage Assignment also purports to transfer the note, BB&T is not relying on that language. More importantly, the reference to the note does not affect the validity of MERS's assignment of the mortgage. *See, e.g., In re Lopez*, 446 B.R. 12, 22 n. 34 (Bankr. D. Mass. 2011) ("Although the Assignment contains language purporting to assign both the Note and Mortgage, MERS lacked an assignable interest in the Note. While this surplusage evidences poor drafting, it does not affect the validity of MERS's assignment of the Mortgage.")

has the right to enforce the mortgage"); *Campbell v. Mortg. Elec. Registration Sys., Inc.*, No. 03–11–00429–CV, 2012 WL 1839357, at *4 (Tex. App. May 18, 2012) ("When a mortgage note is transferred, the mortgage or deed of trust is also automatically transferred to the note holder by virtue of the common-law rule that 'the mortgage follows the note.'") (citation omitted). The Court need not even reach that issue, however, as the assignment of the Mortgage from MERS to BB&T fully complied with Delaware's foreclosure statute.

### *2. BB&T Is a Valid Assignee of the Mortgage and Has Standing to Foreclose under 10 Del. Code § 5061(a).*

10 Del. Code § 5061(a) authorizes "the mortgagee, the mortgagee's heirs, executors, administrators, successors or assigns" to initiate a foreclosure action. Because BB&T is a valid assignee under the statute, it had standing to initiate the foreclosure action.

#### *a. The Assignment from MERS to BB&T Complied with the Requirements of Delaware Law.*

Assignment of mortgages are governed by 25 Del. C. § 2109 which states that, "[a]n assignment of a mortgage or any sealed instrument attested by 1 creditable witness shall be valid and effectual to convey all the right and interests of the assignor." The Mortgage defines the Eids as "Borrower" and is signed by them under oath. (A010 at ¶8; A053 at ¶8; A119; A134.) The Eids agreed on the front page of the Mortgage that "MERS is the mortgagee under this Security

Instrument." (A119.) In the granting clause, the Defendants agreed that "Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS the following described property." (A121.)

As the mortgagee, MERS granted, assigned and transferred the Mortgage to BB&T by instrument dated June 10, 2009. (A143.) The assignment was duly recorded in the real property records for New Castle County, Delaware. (*Id*.) As Judge Butler correctly stated, "[a]s a matter of Delaware law, for an assignment to be valid and to convey all the interest of the assignor it must be attested by one credible witness." (A214.) In this case, the assignment was signed by Rick Miller, and he personally verified in his affidavit that the assignment took place. (A111 at ¶14.) The assignment was also notarized by a witness. (A143.) Judge Butler therefore correctly concluded that the assignment from MERS to BB&T met the requirements under Delaware law for it to be valid. (A214.) As the assignee, BB&T has legal standing under 10 Del. C. § 5061 to bring this foreclosure action.

This Court recently affirmed the validity of a nearly identical MERS assignment in *Albertson v. BAC Home Loan Servicing, LP*, No. 126, 2014, 2014

WL 4952362 (Del. Oct. 1, 2014).[3] Much like the Eids in this case, the Albertsons argued that the bank in their case "did not provide sufficient evidence demonstrating that it had the authority to foreclose upon the mortgaged property." *Id*. at *1.[4] After citing the requirements for a valid assignment under 25 Del. C. § 2109, the Court squarely rejected that argument:

> The assignment here was witnessed by more than one creditable witness and notarized. The record also indicates that MERS was properly designated as the assignor of the mortgage, and that BAC assumed the authority to enforce the mortgage upon the execution of the assignment. Accordingly, the Albertsons have failed to make a showing sufficient to establish a genuine issue of material fact. BAC is entitled to judgment as a matter of law.

*Id*. at *2. The undisputed facts in this case similarly show that the assignment was witnessed and notarized, that MERS was properly designated the assignor, and that BB&T assumed authority to enforce the mortgage upon execution of the assignment. Accordingly, the trial court correctly entered judgment for BB&T.

---

[3] The Eids do not cite *Albertson* in their brief.

[4] Although not expressly addressed in the Court's opinion, the Albertson's opening brief makes clear that they challenged the validity of MERS' assignment of the mortgage under similar theories as the Eids. *See* Appellant's Opening Brief at 33, *Albertson v. BAC Home Loan Servicing LP*, No. 126, 2014, Filing ID 55284292 (Del. Apr. 11, 2014) ("The only tangible evidence of Plaintiff's authority to foreclose the MERS mortgage is a recorded form of Assignment, signed however not by a MERS officer but instead by Plaintiff's own employee, Mary Kirby, falsely claiming to be MERS' Vice President") (internal citations omitted).

*b. The Non-Delaware law relied upon by Mr. Eid is Inapposite.*

The Eids argue that the assignment is invalid because MERS cannot legally assign the Mortgage under Delaware law. The Eids cite no Delaware law for this conclusion, offered no evidence below to support it, and ignore numerous out-of-state cases affirming the validity of MERS assignments and affirming MERS' assignees' standing to foreclose.[5]

---

[5] *See, e.g., Dauenhauer v. Bank of New York Mellon*, No. 13-5810, 2014 WL 1424494, at *4 (6th Cir. Apr. 15, 2014) ("Courts nationally, including Tennessee's, have consistently approved MERS' role in loans when designated as the nominee and beneficiary under a deed of trust."); *Culhane v. Aurora Loan Servs. of Nebraska*, 708 F.3d 282, 294 (1st Cir. 2013) ("We conclude, without serious question, that MERS validly held the mortgage on the plaintiff's premises at the time of the assignment to Aurora. This leads to two further conclusions: the assignment was valid, and Aurora properly exercised the statutory power of sale as both the holder of the mortgage and the loan servicer for the noteholder."); *Bank of New York Mellon Trust Co. NA v. Sachar*, 95 A.D.3d 695, 943 N.Y.S.2d 89 (N.Y. App. Div. 2012) (affirming standing of assignee of MERS who holds note to initiate foreclosure action); *Deutsche Bank Nat. Trust Co. v. Pietranico*, 33 Misc. 3d 528, 551, 928 N.Y.S.2d 818, 835(N.Y. Sup. Ct. 2011) ("the Court finds the role of MERS, as nominee, is not an impediment to plaintiff's standing to bring a foreclosure action, particularly where the borrower expressly agreed without qualification that MERS had the right to foreclose in the event of a default."), *aff'd at* 102 A.D.3d 724 (N.Y. App. Div. 2013); *Taylor v. Deutsche Bank Nat'l Trust Co.*, 44 So. 3d 618, 623 (Fla. 5th Dist. Ct. App. 2010) (holding that assignment "was not defective by reason of the fact that MERS lacked a beneficial ownership interest in the note at the time of the assignment, because MERS was lawfully acting in the place of the holder and was given explicit and agreed upon authority to make just such an assignment."); *Rosa v. Mortg.Elec. Sys., Inc.*, 821 F. Supp. 2d 423, 430 (D. Mass. 2011) ("Since MERS was named as mortgagee and nominee for Pinnacle and Pinnacle's successors and assigns in the Mortgage, MERS was authorized to assign the Mortgage to HSBC AB1."); *Crum v. LaSalle Bank, N.A.*,

Instead, the Eids rely on a series of inapposite decisions that do not address whether an assignee of the mortgage who also holds the note has standing to foreclose. The cases cited by the Eids fall into three general categories: (i) cases where MERS sought to foreclose in its own name when it was not the holder of the underlying note; (ii) cases addressing MERS' ability to transfer a note as opposed to a mortgage; and (iii) miscellaneous cases involving MERS. None of those decisions are persuasive or even applicable here, and in several cases they are contravened by subsequent cases that squarely support the trial court's conclusion that BB&T had standing to foreclose the loan.

(i) Cases Involving MERS as the Foreclosing Party

The Eids cite to a series of decisions dealing with whether MERS can foreclose in its own name. None of those decisions are relevant to the present issue or constitute persuasive, much less binding, authority.

*Mortgage Electronic Registration Systems, Inc. v. Johnston*, Docket No. 420-6-09-Rdcv, slip op. (Vt. Oct. 28, 2009)[6] examined the issue of whether

---

55 So. 3d 266, 269 (Ala. Civ. App. 2009) (holding that MERS had the power to assign mortgage as expressly authorized in the mortgage).

[6] Appellant's Compendium of Unpublished Cases Cited in Appellant's Reply Brief on Appeal and Cross-Appellee's Answering Brief on Cross-Appeal, filed simultaneously with this brief, contains copies of the unpublished opinions cited herein that do not already appear in the Eids' Appendix to their Answering Brief and Opening Brief on Cross-Appeal.

MERS could foreclose on a mortgage in its name given that it did not own the underlying debt. In concluding that it could not, the court expressly noted that "the result need not be inequitable if the rules of mortgage law are properly followed" because "*if a loan is to be foreclosed MERS could assign the mortgage in order to allow for a foreclosure action*." Slip. Op. at 16-17 (emphasis added). That is exactly what happened in this case.

*Mortgage Electronic Registration Systems, Inc. v. Girdvainis*, Civil Action No. 2005-CP-43-0278 (S.C. Ct. Comm. Pleas Jan. 20, 2006) similarly dealt with whether MERS could initiate a foreclosure action and did not address the question of the rights of an assignee who holds the mortgage. The South Carolina Supreme Court actually addressed that issue in *BAC Home Loan Servicing, L.P. v. Kinder*, 731 S.E.2d 547, 548-49 (S.C. 2012), where it held that an assignee of a second mortgage recorded with MERS as mortgagee had standing to claim surplus funds from the foreclosure of the first mortgage.

*Bain v. Metropolitan Mortgage Group, Inc.*, 285 P.3d 34 (Wash. 2012) involved the issue of whether MERS met the statutory definition of trust deed "beneficiary" under the very narrow definition of beneficiary contained in the Washington Deed of Trust Act when MERS was not the holder of the promissory note. The *Bain* court held MERS did not meet the definition under the facts of that case, but made no determination regarding MERS' ability to assign a deed of trust.

Numerous Washington courts since *Bain* have held that decision has no relevance where a MERS assignee also holds the note. *See In re Butler*, 512 B.R. 643, 656 (Bankr. W.D. Wash. 2014) ("[A]ny assignment of the Deed of Trust from MERS to One West had no legal effect on the ownership or possession of the Note and was irrelevant for purposes of the disputes at issue here."); *Ortega v. Nw. Tr. Servs., Inc.*, No. 69652–1–I, 2014 WL 646347, at *7 (Wash. Ct. App. Feb. 18, 2014) (unpublished) ("As the actual holder of the note, Wells Fargo has authority to enforce the note under *Bain*, regardless of MERS's identification in the deed of trust."); *Ukpoma v. U.S. Bank Nat. Ass'n*, 12-CV-0184-TOR, 2013 WL 1934172, at *3 (E.D. Wash. May 9, 2013) ("[B]y virtue of being in possession of the note, U.S. Bank is the lawful owner. Its right to receive payment on the note does not depend upon any assignment of the note from MERS.") Moreover, *Bain* relates to MERS's role under Washington's non-judicial foreclosure law and has no relevance to the issue of a MERS mortgage assignment under Delaware's judicial foreclosure statute.

*In re Joshua and Stephanie Mitchell*, No. BK-S-07-16226-LBR (Bankr. D. Nev. Aug. 19, 2008), similar to *Bain*, addressed MERS' ability to foreclose as a "beneficiary" under a deed of trust. Although that case held that MERS could not foreclose under the deed of trust, it did not address the issue of the standing of a MERS assignee. Here again, the Eids ignore a subsequent,

apposite decision from the Nevada Supreme Court. In *Edelstein v. Bank of New York Mellon*, 286 P.3d 249, 259-60 (Nev. 2012), the Nevada Supreme Court expressly held that MERS had the authority to assign a deed of trust and that an assignee who also held the note could foreclose. *Id*. at 260 ("MERS, as a valid beneficiary, may assign its beneficial interest in the deed of trust to the holder of the note, at which time the documents are reunified.")

(ii) Cases Involving MERS' Authority to Transfer the Note

The Eids cite two decisions that address the issue of whether MERS has authority to transfer promissory notes. *See Bellistri v. Ocwen*, 284 S.W.3d 619 (Mo. Ct. App. 2009); *In re Wilhelm*, 407 B.R. 392 (Bankr. D. Id. 2009). These decisions are inapposite, as BB&T does not contend that it received the Note through an assignment from MERS. Rather, as detailed above, the Note was properly negotiated to BB&T under Delaware law through endorsement and transfer of physical possession.[7]

[7] Missouri and Idaho are both deed of trusts states, and subsequent decisions in both jurisdictions confirm that although MERS may not assign a note, there is nothing improper in having MERS act as a beneficiary under a deed of trust. *See Mortg. Elec. Registration Sys., Inc. v. Bellistri*, No. 4:09-cv-731, 2010 WL 2720802 (E.D. Mo. July 1, 2010) (holding that MERS could act as a beneficiary under a deed of trust under Missouri law); *Edwards v. Mortg. Elec. Registration Sys., Inc.*, 300 P.3d 43, 50 (Idaho 2013) (holding that MERS, as the lender's nominee and agent, could act as a beneficiary and direct a trustee to initiate foreclosure proceedings).

(iii) Miscellaneous cases involving MERS

*Landmark Nat. Bank v. Kesler*, 216 P.3d 158 (Kan. 2009), did not address assignee standing, but dealt with the question of whether MERS was a necessary party to a foreclosure action. The Kansas Supreme Court's conclusion that MERS was not a necessary party to an independent foreclosure action is irrelevant to this present case. Moreover, the Eids fail to mention a subsequent decision of the Kansas Court of Appeals that is actually on point. In *MetLife Home Loans v. Hansen*, 286 P.3d 1150, 1156-58 (Kan. App. 2012), the court held that because MERS acts as an agent for the original lender and its assigns, a subsequent assignee who holds the note and mortgage—like BB&T in this case—has standing to foreclose.

*Mortgage Electronic Registration Systems, Inc. v. Southwest Homes of Arkansas, Inc.*, 301 S.W.3d 1 (Ark. 2009) similarly involved the issue of whether MERS was a necessary party to a foreclosure action brought by a trustee under a deed of trust. In concluding that MERS was not a necessary party, the Arkansas Supreme Court did not pass on the issue of whether MERS had the authority under the terms of the security instrument to effect an assignment of the deed of trust. A subsequent Arkansas federal court decision held that MERS does have that authority, and that MERS assignees can validly foreclose. *See Coley v. Accredited Home Lenders, Inc.*, No. 4:10CV01870, 2011 WL 1193072, at *4 (E.D.

Ark. Mar. 29, 2011) ("[T]he exhibits attached to the complaint indicate that MERS acted within its role as agent when it transferred the note and mortgage from its principal to HSBC. Thus, HSBC was within its rights in attempting to collect on the mortgage, and the claims against it must be dismissed.").

Finally, *Mortgage Electronic Registration Systems, Inc. v. Nebraska Dept. of Banking and Finance*, 704 N.W.2d 784 (Neb. 2005) has no bearing on the issue of standing. The issue in that case was whether MERS qualified as a mortgage banker subject to the Nebraska Registrations and Licensing Act. *Id*. at 785. In concluding that MERS was not subject to the Act, the Nebraska Supreme Court did not pass on the issue of the validity of MERS assignments.

### *3. Even if the Assignment Was Suspect, Mr. Eid Lacks Standing to Challenge It.*

Mr. Eid lacks standing to challenge the validity of the assignment because he is not a party to the assignment, was not a third party beneficiary and cannot show harm resulting from the MERS assignment to BB&T. Although this Court has not addressed this question directly, "for over a century, state and federal courts around the country have applied similar reasoning to hold that a litigant who is not a party to an assignment lacks standing to challenge that assignment." *Livonia Prop. Holdings, L.L.C. v. 12840-12976 Farmington Rd. Holdings, L.L.C.*, 717 F. Supp. 2d 724, 736-37 (E.D. Mich. 2010) (collecting cases), *aff'd*, 399 F. App'x 97 (6th Cir. 2010); *see also Montgomery v. Bank of Am.*, 740 S.E.2d 434,

438 (Ga. Ct. App. 2013) ("Even if we were to assume, for the purposes of argument, that Crouse's execution of the assignment on behalf of MERS was flawed, the proper party to bring a claim against MERS would be the other party to the assignment, BAC. Accordingly, Montgomery has no basis to contest the validity of the assignment.") As the federal court in Michigan explained, "[a]fter the assignments, Borrower's rights and duties under the Loan Documents remain the same, the only change being *to whom* those duties are owed. Borrower cannot now step into the shoes of an assignor to assert its contract rights." *Livonia Prop. Holdings*, 717 F. Supp. 2d at 737 (emphasis in original).

The Superior Court has reached the same conclusion in a similar case involving an assignment from MERS. *See CitiMortgage, Inc. v. Bishop*, C.A. No. 09L–07–313, 2013 WL 1143670, at *4-5 (Del. Sup. Ct. March 4, 2013) (holding that borrower lacked standing to challenge MERS assignment). This result is particularly appropriate where, as here, the Eids have not identified any prejudice that they have suffered as a result of the MERS assignment. *See Herrera v. Fed. Nat'l Mortgage Ass'n*, 141 Cal. Rptr. 3d 326, 335 (Cal. 4th Dist. Ct. App., May 17, 2012) ("Even assuming plaintiffs can allege specific facts showing that MERS assignment of the DOT to OneWest and OneWest's assignment to Fannie Mae were void, under *Fontenot* [*v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256 (2011)] plaintiffs must also show plaintiffs were prejudiced[.]")

## IV. THE COURT PROPERLY GRANTED SUMMARY JUDGMENT TO BB&T.

### A. Question Presented

Whether Judge Butler properly granted summary judgment to BB&T where Mr. Eid admitted that he defaulted on the note and mortgage and failed to offer any evidence disputing the accuracy and validity of the loan documents?

### B. Scope of Review

The Court reviews a grant of summary judgment *de novo*. *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009). On review, the Court "must determine whether the record shows that there is no genuine material issue of fact and the moving party is entitled to judgment as a matter of law." *Id*. (internal quotation and citation omitted). "When the evidence shows no genuine issues of material fact in dispute, the burden shifts to the nonmoving party to demonstrate that there are genuine issues of material fact that must be resolved at trial." *Id*.; Del. R. Civ. P. 56(e) ("[A]n adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial.")

## C. Merits of the Argument

### *1. BB&T Presented Competent Evidence in Support of Its Motion for Summary Judgment.*

In support of its Motion for Summary Judgment, BB&T submitted the affidavit of Rick Miller, Assistant Vice President in the Non-Performing Assets division of BB&T. (A109-13.) Mr. Miller's affidavit attaches the Note, Mortgage, and related documents. The Eids contend that the affidavit is invalid because Mr. Miller's assertions about the loan documents constitute inadmissible hearsay under Delaware Rule of Evidence 803(6). The Eids misunderstand both the import of the Miller affidavit and the Delaware evidentiary rules governing admissibility of the Note and Mortgage.

The Eids' assertion that "Mr. Miller did not and could not have any personal knowledge of the alleged MERS assignment as he was not a party to and did not create that assignment" (Answering Br. at 32) is demonstrably false—the assignment of the mortgage from MERS to BB&T *is signed by Mr. Miller*. (*See* A143.) As Judge Butler correctly observed, "[w]e may fairly infer that he had personal knowledge of the document he signed." (A213.) The Eids' persistence in arguing that Mr. Miller lacks personal knowledge of the assignment in the face of documentary evidence to the contrary stretches the limits of credulity.

Moreover, the assignment complied with the requirements of Delaware law independent of Mr. Miller's personal knowledge, as it was attested

to by one witness. As Judge Butler again correctly noted (A214), that is all that is required under Delaware law, and the mortgage is independently admissible under Delaware Rule of Evidence 806(13), which provides an exception to the hearsay rule for documents affecting an interest in property.

The Eids' argument (Answering Br. at 32) that "there is nothing in the Miller Affidavit upon which the trial court could have found that he was employed by BB&T" when the Note was negotiated similarly misses the point. As detailed in Section III.C.1 above, the Note is a bearer instrument under Delaware's Uniform Commercial Code. That makes it self-authenticating. *See* Del. R. Evid. 902(9) ("Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: . . . . (9) Commercial Paper and Related Documents. Commercial paper, signatures thereon and documents relating thereto to the extent provided by general commercial law."). Because Mr. Eid failed to come forward with any evidence challenging the authenticity of the Note or the endorsements thereon, the court properly considered it on summary judgment. *See In re Miller*, No. 10–25453–MER, 2012 WL 6041639, at *7 (Bankr. D. Colo. Dec. 4, 2012), *aff'd sub nom.*, *Miller v. Deutsche Bank Nat. Trust Co.*, No. 12–cv–03279–PAB, 2013 WL 4776054 (D. Colo. Sept. 4, 2013) (under Fed. R. Evid. 902, "if the opponent offers no proof contesting the authenticity of self-authenticating evidence, the Court will admit the offered document into evidence.")

### *2. The Eids Failed to Come Forward with Any Evidence to Rebut BB&T's Evidentiary Submission or Establish the Existence of a Genuine Issue of Material Fact.*

The Eids offered no evidence in the trial court to challenge the admissibility of the Note, Mortgage, or related documents. As Judge Butler put it, "Defendants' problem is not the Miller affidavit; it is the documents appended thereto. The authenticity and correctness of these documents are not challenged, we presume because they cannot be." (A212.) On appeal, the Eids again fail to offer any evidence to contradict the authenticity or correctness of the loan documents. The Eids' argument in effect is a wholly legal argument regarding the validity of the transfer of the note and the assignment of the mortgage to BB&T. Because resolution of those arguments does not turn on any disputed issues of fact, the trial court properly granted summary judgment to BB&T.

The Eids' argument that the trial court itself identified disputed material facts is contradicted by the record. Judge Butler did not state that the Eids had raised genuine fact issues. To the contrary, he recognized that the Eids "have not yet put a genuine fact in dispute that requires a trial" and stated that "If you want to make a *legal argument* that nominees are not assignees or whatever . . . . If you want to make a *legal argument* that the plaintiff doesn't have standing, I'll listen." (A167 at 30-31) (emphasis added). Judge Butler then went on to observe that *if* the Eids identified a material factual dispute, *then* an evidentiary hearing

might be necessary. This is a far cry from the Eids' assertion (at 38) that "the trial court thus recognized that a more thorough inquiry into the facts was needed under the circumstances."

The Eids attempt to manufacture a factual dispute by arguing that "the genuine facts as to what MERS is and can and cannot do, by virtue of its own Terms and Conditions were disputed, precluding summary judgment as a matter of law." (Answering Br. at 40.) This statement stands in stark contrast to the Eids' earlier assertion in the same brief that "MERS is precluded, by its prior judicial admissions, case law, and its own self-imposed Terms and Conditions, from either creating or transferring any beneficial interest in mortgage loans." (*Id*. at 18.) In other words, the Eids simultaneously argue that the MERS assignment is invalid as a matter of law *and* that a genuine fact dispute exists as to the validity of the MERS assignment. The Eids cannot have it both ways, and Judge Butler correctly concluded that no genuine fact issues existed and that BB&T was entitled to summary judgment.

## CONCLUSION

Based on the foregoing, and for the reasons stated in its opening brief, BB&T respectfully requests that the Court reverse the trial court's grant of the Motion to Vacate, reinstate the March 20, 2014 Judgment, and dismiss Appellees' cross-appeal as untimely. In the alternative, BB&T requests that the Court affirm the trial court's grant of summary judgment and entry of the July 21, 2014 Judgment in favor of BB&T.

Respectfully submitted,

*/s/ Robert T. Aulgur, Jr.*
Robert T. Aulgur, Jr. (No. 165)
WHITTINGTON & AULGUR
651 N. Broad St., Suite 206
P.O. Box 1040
Middletown, DE 19709
(302) 378-1661

Michael Montecalvo
(*pro hac vice*)
Brent F. Powell
(*pro hac vice*)
WOMBLE CARLYLE SANDRIDGE & RICE LLP
One W. Fourth St.
Winston-Salem, NC 27101
(336) 721-3600

*Counsel for Branch Banking and Trust Company*